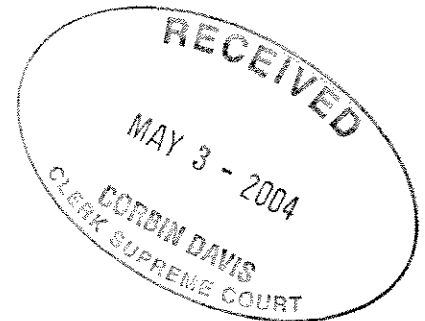


Raymond C. Walen, Jr.  
171194  
Muskegon Correctional Facility  
2400 S. Sheridan  
Muskegon, MI 49442

April 29, 2004

Mr. Corbin Davis  
Clerk  
Michigan Supreme Court  
P O Box 30052  
Lansing, MI 48909



Re: File No. ADM 2003-04

Dear Mr. Davis:

I write to comment on the following provisions of the proposed rule changes: the 25 page limit on the combined length of the motion and supporting memorandum in MCR 6.502(C); the 1 year time limitation in MCR 6.508(E)(1) and (2); and the standards of review in MCR 6.508(D)(1)(a) and (D)(2)(a).

I hope the Court will decline to adopt these provisions. If the Court feels some change of these rules is necessary, I hope the Court will ask the Committee to reconsider its recommendations in light of the points raised in the letters it receives.

It is crucial to understand that a large part of the population affected by the changes is handicapped by mental health problems, illiteracy, or a lack of resources generally.

In Cain v MDOC, we reviewed the Department of Corrections' CMIS database to determine how many men at each level had been treated for mental health problems either prior to or during incarceration. We sorted them by security level and whether they were in general population or segregation. Here is what we found as of December 15, 2001:

	% with mental health treatment before or during imprisonment	
Level	Segregation	General population
6	99+%	99+%
5	99%	86%
4	92%	66%
3-2-1	96%	41%

Low literacy levels are serious problem. A reading level higher than 12th grade is required to understand typical Michigan legal

materials. Hadix v Johnson, 694 F Supp 259, 269 n 7 (ED Mich 1988) rev'd on other grounds Knop v Johnson, 977 F2d 996 (6th Cir. 1992).

Incoming prisoners as well as those in MDOC education programs take the Test of Adult Basic Education ("TABE test"). The TABE test measures reading, language, math, and spelling abilities; the results are reported by grade level. The lowest possible score is zero; the highest is grade level 12.9. In a recent ten year period, thousands of prisoners with a high school diploma or GED who took the TABE test in prison averaged less than a ninth grade reading level and less than a seventh grade language level. (The TABE language test "measures skills needed to communicate effectively." See enclosure.)

Despite these low scores, because they have a high school diploma or GED, these men do not receive any assistance with their legal work and must do it themselves unless they can afford to pay for competent help. That will not occur in the vast majority of cases, because they simply do not have the money to hire the help necessary to present their claims to the court in intelligible form.

In 2002, the Legislature considered whether to charge prisoners a \$60 fee for the DNA testing required by MCL 791.233d. That proposal was abandoned when MDOC Director Overton reported that fewer than 25% of Michigan's prisoners had \$60 in their prison account.

The legal assistance provided to the few who qualify is hardly sufficient. The "Legal Writers" who assist those without a high school diploma or GED have received approximately 80 classroom hours of instruction over 2 or 3 weeks on post-conviction and civil rights law and procedure.

The community college paralegal training programs in place when I came to prison have been eliminated, as has all higher education. It is virtually impossible for a person without legal knowledge to come into prison and learn enough to prepare a meaningful post-conviction petition within one year of the date his conviction becomes final. For these reasons, the proposed one year time limit is neither fair nor practical.

Similarly, it may not be possible for an untrained, uneducated person to say everything he needs to say on a complicated case in 25 pages or less, especially if he has to hand write them. For the same reasons judges do not like long pro per pleadings - they can be repetitive, irrelevant, confusing, or worse - judges are unlikely to give a pro per litigant leave to file more pages, although these are precisely the litigants who are likely to need more pages to explain themselves.

Prisoners do not have access to the sophisticated word processing equipment that lawyers have. It is impossible to reproduce a 25 page typewritten document in 25 handwritten pages. A typewriter with no memory costs \$197, one with 128K memory is nearly \$300. Few can afford them. Some prisons have typewriters available for use in the law library, but these are basic models, they do not always work, and due to demand they are only available for one's use a few hours per week. In habeas corpus cases federal courts do not enforce length restrictions on pleadings filed by pro per prisoners, even in the Sixth Circuit Court of Appeals. This highlights the unfairness of enforcing such a limit in the trial courts, where prisoners must first file to exhaust state remedies prior to filing federal habeas corpus.

The change in the "cause and prejudice" standard is very troubling. The Committee's Overview on paragraph 6.508(D) states, "motions for relief from judgment are routinely filed that barely attempt to show cause, and where prejudice as defined cannot be demonstrated." Eliminating the "cause and prejudice" standard will not resolve this problem. The root of the problem is illiteracy, mental problems, and lack of resources and legal assistance, not the standard of review or the current rule.

For example, I have heard from many prisoners about the proposed rule changes. Every one thought elimination of "cause and prejudice" was a good idea, that the Committee wants to make it easier to file and win a 6.500 motion. I spoke with several who are waiting to file their motions until the "new standard" is adopted. Nobody got the point. The effect of changing the standard will increase, not reduce, the number of such motions with which judges must contend.

It is unclear why the Committee proposes to abandon "cause and prejudice" in favor of a standard where relief could be granted only where the prisoner's motion establishes "the probability of a different result on retrial because of an irregularity so offensive as to seriously affect the fundamental fairness, integrity, or public reputation of judicial proceedings" or there is "clear and convincing evidence" that the defendant is actually innocent.

The Committee Comment regarding paragraph (D)(1)(b) cites no case from any jurisdiction where the proposed new standard for postconviction review has been applied. And every case cited in this section of the report was an appeal of right.

People v Carines, 460 Mich 570 (1999), involved an appeal of right. The Court did not apply the proposed standard for postconviction review. The Committee cites it to support its

assertion that the standard of review on post-conviction cases in the trial court should be higher than the standard of review in the Court of Appeals on direct appeal. That point was neither considered nor decided in Carines.

United States v Saro, 24 F3d 283 (DC Cir. 1994), was a direct appeal in which the issue raised was the standard of review to be applied in the federal court of appeals for an error in the defendant's presentence report. It did not decide the standard of review of a post-conviction motion.

United States v Santistevan, 39 F3d 250 (10th Cir. 1994), was also a direct appeal. The defendant was convicted on three counts of drug charges. The trial court granted his motion for acquittal on two counts. The government appealed, and the appellate court affirmed. It disagreed with the trial court's rationale, but held that the federal appellate court has "inherent power to raise an issue sua sponte as plain error under circumstances strongly implying a fundamental defect or error of sufficient magnitude to undermine our confidence that justice was served." 39 F3d, 256. The court was not concerned with the standard of review applied by the trial court hearing a post-conviction motion.

Here we are talking about the standard of review a trial court should apply in deciding a postconviction motion for relief from judgment under MCR 6.500. If the proposed standard is better than the current cause and prejudice, it would be helpful to see a case where it has been applied. From the Committee's Report, unfortunately, there does not appear to be one.

It might be helpful to know what standards other state and federal courts apply to post-conviction motions for relief from judgment and whether they are deluged with meritless motions. This could advance the discussion of the merits of various standards.

According to the Committee Comments on paragraph (D)(2)(a), the intent of the proposed changes is to "heighten[] the burden on the defendant to gain relief." Why is that necessary or desirable? How many prisoners have actually won a contested motion for relief from judgment under the current rules?

Perhaps the confusion in the "cause and prejudice" standard which bothers the Committee is due to the lack, until recently, of Michigan case law interpreting the rule. The recent decision in People v McSwain, 259 Mich App 546, 678-689 (2003), which may not have been available when this recommendation was developed, may help to resolve that problem.


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One way to resolve parties' and trial courts' problems interpreting the existing rules may be to develop a body of case law that explains what they mean and how they are to be applied, rather than changing the rules when they do not seem to be working. More grants of leave to appeal to defendants in 6.500 cases by the Court of Appeals and this Court would facilitate that goal.

Having been in prison for over 22 years, I am acutely aware that people who are frustrated by the system are extremely difficult to deal with and often miss the point entirely. Thus I can appreciate the position of the Judges' Association, that long briefs which repeat issues already decided on appeal are time consuming to read and are unlikely to lead to relief. But changing the rules will not change the fact that those affected - for the most part - do not understand the rules. The solution to that problem will be found in providing meaningful legal assistance from a credible source.

If I can provide further information, please do not hesitate to let me know. Thank you for considering my comments.

Very truly yours,



Raymond C. Walen, Jr.

Encls.

## ABE and Pre-GED Assessments Tests of Adult Basic Education (TABE®), Forms 7&8

Assessments of adult skills in reading, language, mathematics, and spelling.

© 1994, CTB/McGraw-Hill

### Characteristics

Age: Adult  
 Levels: 5 (L, E, M, D, A)  
 Forms: 2  
 Purpose: Adult basic skills in reading, language, mathematics, and spelling

### The product offers

- Tests of basic education achievement
- A flexible component selection system, including an interview form and locator test
- Multiple levels, including pre-literacy
- Charts that show how items relate to scale scores
- Information necessary for Ability to Benefit approval

### You benefit by

- Having tools to assess a diverse student population
- Engaging and motivating test-takers at all levels
- Using fully integrated objectives and easy-to-understand scores
- Gaining means for measuring student progress with pre- and post-testing

### Overview

Tests of Adult Basic Education (TABE) assesses basic reading, mathematics, and language skills. The assessment yields objective-mastery information for skills usually learned in Grades 1–12, and provides percentile and scale scores. Grade equivalent scores are also provided for TABE.

Recommendations included in a report by the Secretary's Commission on Achieving Necessary Skills (SCANS) directly influenced the development of TABE 7&8. In addition to assessing foundation skills such as reading, mathematics, and language, TABE 7&8 addresses SCANS competencies. TABE items are classified into a Thinking Skills Classification that mirrors SCANS—gather information, organize information, analyze information, generate ideas, synthesize elements, and evaluate outcomes.

TABE 7&8 provides comprehensive and reliable information to ensure that your adult students will be successful in today's society. The tests support the same philosophies found in the best adult education programs—they highlight numerous integrated objectives, feature items that focus on adult life skills, and provide correlations to predict success on the General Educational Development (GED) tests.

TABE 7&8 scores for Levels D (Difficult) and A (Advanced) predict performance on the GED. Level A is approved by the federal government to demonstrate "ability to benefit" for students who want to apply for government-sponsored student loans. Programs that use the National Reporting System can use TABE to demonstrate student progress toward literacy, education, and job-related goals.

The assessments include tests in Reading, Mathematics Computation, Applied Mathematics, Language, and Spelling, and provide norm-referenced and competency-based information.

TABE is scored locally by hand or with TestMate TABE Software. See page 15.

### Complete Battery and Survey Components

TABE's various components, levels, and forms allow you to efficiently focus your assessment activities. You can choose either the Complete Battery for both norm- and curriculum-referenced information, or the Survey if time is limited. Administering the Survey takes half the time of the Complete Battery and yields Total Reading, Total Math, Total Language, and Total Battery scores.

You can alternately administer TABE's two parallel forms—7 and 8—to ensure valid results when retesting the same students. An optional Locator Test allows you to select the right level of assessment for each student.

Level	Grade Range	
	TABE 7&8	TABE 5&6
L (Limited literacy)	0–1.9	—
E (Easy)	1.6–3.9	2.6–4.9
M (Medium)	3.6–6.9	4.6–6.9
D (Difficult)	6.6–8.9	6.6–8.9
A (Advanced)	8.6–12.9	8.6–12.9

### Engaging Test Content

TABE 7&8 is interesting at all test levels. Test items focus on cultures and life skills; all items and passages are as free as possible from ethnic, age, and gender bias.

### Reading

This test measures basic reading skills in life-skill and academic contexts. It assesses beginning reading skills in a manner appropriate for adults. Items measure prose and document literacy, such as reading diagrams, maps, charts, tables, forms, and consumer labels.

Because reading is a complex, interactive process, the test measures vocabulary skills as part of the reading process. This assessment supports holistic teaching. It also reduces testing time because the test reports vocabulary as a competency, rather than as a separate test.

### Mathematics

The Mathematics Computation and Applied Mathematics tests measure mathematical skills and concepts useful for adult life and work. Test contexts include measuring and cooking, budgeting, comparison shopping, and interpreting data. Like the Reading test, Applied Mathematics uses real-life documents, such as tax forms, to enhance content and make the test more relevant to daily life. A range of difficulty addresses the needs of all skill levels.

### Language

This test measures skills needed to communicate effectively on the job and in daily life. It supports and reinforces adult writing instruction at all levels. It integrates skill assessment in mechanics, usage, sentence formation, and paragraph development.

Most items focus directly on problem areas typically encountered when adults write letters, résumés, job-related reports, or GED essays.

### Spelling

Since spelling is often an area of particular difficulty involving a wide range of interrelated language traits—listening, speaking, reading, and writing—it receives an isolated focus in TABE. Item format de-emphasizes reading and vocabulary skills and focuses directly on spelling skills.

### Adult Scale Score

The TABE 7&8 scale score is based on the ways adults learn and perform. The TABE 7&8 scale compares performance and presents a very relevant score. It makes pre- and post-testing to measure growth easier because scaling between levels is smoother than for previous TABE editions.

A Marker Items Book interprets scale scores through examples of stimulus materials and items that demonstrate various levels of scale scores. Passages and items are presented with scores attached so students and teachers can compare performance with difficulty level.

### TABE-PC for Personal Computer Administration

TABE-PC software saves time in administration, scoring, and reporting because it handles everything right on your personal computer. Individually administering tests electronically, TABE-PC does much of the work of the typical test administrator. It provides complete and easy-to-follow instructions, times each test, and monitors examinee progress through the tests. It also provides immediate

results. For detailed TABE-PC information, see page 16.

### Accommodations for Students with Special Needs

An accommodation is a change made to the test administration procedure—it provides equal access for students with disabilities, allowing them to demonstrate their knowledge and skills. If an accommodation is employed, it is important that the accommodation minimize any advantage or disadvantage associated with completing the test. If an accommodation under consideration is not used in instruction, it should not be used in the testing situation.

TABE-PC is appropriate for some students who have difficulty taking paper-and-pencil tests. Administrators may offer other accommodations, such as allowing extra time to complete the test or letting students mark answers in test booklets rather than on answer sheets.

CTB offers special editions of TABE for people with visual disabilities. Large Print editions of TABE are available from CTB. Braille editions may be ordered through the American Printing House for the Blind (502/895-2405).

Accommodation suggestions are available in the CTB Assessment Accommodations Guide (page 126). You may also choose to consult CTB's free publication, *Guidelines for Inclusive Test Administration*.

### TABE Support

Find frequently asked questions, a glossary of assessment terms, and other helpful information on the TABE website. [www.ctb.com/tabe](http://www.ctb.com/tabe)

## TABE 7&8 Item Counts and Time Limits

The following tables list item counts and test times for TABE 7&8 components.

### Locator Test: Item Count and Test Times

	No. Items	Est. Testing Time* (h:m)
Locator Test		
Reading	17	:18
Mathematics	18	:16
Language	15	:15

\* Please note that these times are used as guidelines only.

### Levels E, M, D, and A: Item Count and Test Times\*

Test	Complete Battery		Survey	
	No. Items	Testing Time (h:m)	No. Items	Testing Time (h:m)
Reading	50	:50	25	:25
Math Comp	25	:15	15	:09
Applied Math	50	:50	25	:25
Language	55	:39	25	:18
Spelling	20	:10	20	:10
Total	200	2:44	110	1:27

\* Allow 10 minutes for instruction, recording names on answer sheets, etc. Note that the Spelling test is optional and does not contribute to the Total Battery scores.

TABE 7&8

## LEGAL WRITERS FOR THE LEGAL WRITER PROGRAM

Legal Writer Programs are designed to assist eligible prisoners with their legal work. These programs are offered in most Department institutions. We are currently seeking applicants for legal writer training. To be a legal writer you must meet the qualifications listed below. If selected, you will participate in a 2 to 3 week training program which consists of approximately 80 hours of training. This training will cover topics such as Federal and State Court Systems including post-conviction relief afforded by MCR 6.500 and federal habeas corpus claims; Administrative Law including Department Administrative Rules and prisoner rights in administrative hearings for purposes of exhaustion of remedies; Criminal Law and Procedure including issue identification and constitutional rights of the accused; Constitutional Rights of prisoners; and research and writing including preparation of approved court forms and briefs

The classes will also cover topics such as how to use the law library, how to construct a legal argument, how to interview a client, and how to evaluate a case.

You must attend all the training and pass a competency exam to be hired as a legal writer. More prisoners will be trained than will be initially assigned to work as legal writers, therefore, your selection to participate in the training does not guarantee your immediate assignment as a legal writer. The Department determines which prisoners will be trained so receipt of your request does not guarantee that you will be selected to participate in the training. After completion of the training you may also be transferred to another institution, consistent with your custody level, to work as a legal writer.

**To be eligible for the Legal Writer Training Program, a prisoner must meet all of the following criteria:**

- (1) Be classified to general population.
- (2) Must have one of the following:
  - a) scored at the 11th grade level or higher on the TABS test or similar test as determined by the Department, or
  - b) have a GED certificate, or
  - c) have a High School Diploma, or
  - d) obtained college credits or a degree.
- (3) Have a minimum of 1 year left prior to eligibility for community programs or parole based on the date of admission to the Legal Writer Training Program.
- (4) Overall prison record demonstrates trustworthiness and behavioral adjustment.
- (5) Be eligible under the criteria established in OP 01.04.105-B for computer use.

If you have an interest in being trained as a legal writer please send a kite to the Warden's Administrative Assistant by May 7, 2004.